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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~986~~ 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

JACOB SHEINKMAN
15 Union Square West
New York, New York 10003

RALPH N. JACKSON
1411 Decatur Street
New Orleans, Louisiana 70116
Attorneys for Amalgamated Clothing Workers of America, AFL-CIO

JAMES J. GRAHAM
46 Washington Mews
New York, New York 10003
of Counsel

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

The Respondent, Amalgamated Clothing Workers of America, AFL-CIO (the "Union"), a party to the proceeding in the court below, submits this brief pursuant to Rule 21, par. 6, of the Rules of this Court, in support of the position of petitioner, National Labor Relations Board (the "Board") on writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the court of appeals (A. 957) is reported at 399 F. 2d 356 (1968). The Board's supplemental decision and order (A. 3) are reported at 158 N.L.R.B. 1414 (1966).

Jurisdiction

The judgment of the court of appeals was entered on August 26, 1968 (A. 974). On October 1, 1968 it denied timely petitions by the Board and the Union for rehearing *en banc* (A. 976). On December 23, 1968 Mr. Justice Fortas extended the time for filing a petition for writ of certiorari to and including January 9, 1969. The writ was granted on March 3, 1969. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be

required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:

* * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are as follows:

ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act —(a) APPEARANCE.—* * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. * * *

Sec. 10. * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *

Question Presented

Whether the court of appeals erred in denying employees backpay to which they were otherwise entitled under the National Labor Relations Act because of the Board's alleged "inordinate delay" in processing the backpay claims for submission to a recalcitrant employer represented since prior to the commission of the underlying unfair labor practices by the same firm of experienced labor counsel.

Statement of the Case

Background

In the words of the court of appeals the "origins of the difficulty" (A. 958; 399 F. 2d 357) lie in the Union's efforts to organize the 600 employees of respondent, J. H. Rutter-Rex Manufacturing Company, Inc. (the "Company"). These efforts began in 1949 and were marred by threats and unlawful promises of benefits as found by the Board (86 N.L.R.B. 470; 90 N.L.R.B. 130) and the Fifth Circuit Court of Appeals (189 F. 2d 610).

Continued unfair labor practices by the Company prevented the employees from exercising their organizational rights. The court of appeals (229 F. 2d 817) sustained a Board finding (111 N.L.R.B. 1099, 1105) that in 1953 the President of the Company made a speech in which he threatened to discharge, if necessary, four or five hundred employees to keep the Union out of his plant. The record in that earlier case, said the court below, was "permeated throughout with cogent testimony of company antipathy toward the union" (A. 958; 399 F. 2d 357, citing 229 F. 2d 819).

Even though the Union's efforts culminated in 1954 with certification after election of the Union as collective bargaining agent of the Company's employees, the court of appeals in the case which gave rise to the instant proceeding concurred (245 F. 2d 594) in the Board's finding (115 N.L.R.B. 388) that the one year strike of 1954-1955 was provoked by the Company's categorical refusal to continue negotiating. The Board's Trial Examiner found "multiple uncontradicted proof that Company representatives from J. H. Rutter on down declared at various times to individual strikers that the Company would not sign any contract with the Union" (115 N.L.R.B. 388, 396).

The Backpay Proceedings

The Board order in the unfair labor practice case underlying the instant proceeding contained the usual requirement that strikers be reinstated to their "former or substantially equivalent positions" with an employee's backpay to commence five days after his application for reinstatement (115 N.L.R.B. 391).

On August 21, 1957, two days after the entry of the decree by the Court of Appeals for the Fifth Circuit enforcing the Board order, Board attorneys wrote the Company offering their assistance in "effecting prompt compliance" and advised the Company that notification of closing of the case would follow full compliance with the court's decree. "Until you receive such notice you will know that the case remains open for all purposes as awaiting compliance" (A. 967; 399 F. 2d 362). On November 7, 1957, counsel for the Company wrote the Board that his client had already complied with "some" of the provisions of the decree and was then engaged in bargaining with the Union. Counsel asked to be advised of any instance of a failure to "fully" comply (A. 966; 399 F. 2d 362).

Pursuant to a letter dated March 22, 1960, the Board commenced an investigation of Company records to ascertain the extent of compliance (A. 968; 399 F. 2d 362). On November 16, 1961, the Board issued a backpay specification which alleged as of July, 1961 monetary claims totalling approximately $342,000 on behalf of only 207 of 575 strikers who sought backpay (A. 961; 399 F. 2d 359). Following a hearing which concluded on September 30, 1963, after more than fifty-eight sessions (A. 971; 399 F. 2d 364), the Board's Trial Examiner denied backpay entirely to 35 of the claimants and reduced the money total to $160,894.69 as of June 30, 1961 (R. 7-8, 166-554). In sustaining its examiner in significant part, the five-man Board reduced slightly the Company's monetary liability to $159,016.32 (A. 961; 399 F. 2d 359). The court of

appeals further narrowed the examiner's recommended order by refusing to enforce the award as to ten employees and tolling backpay entirely as of June 30, 1959 (A. 972; 399 F. 2d 365).

During the crucial hiatus between the Company's letter of November 7, 1957 and the issuance of the specification in 1961, admittedly the manpower resources of the Board's regional office in New Orleans were extremely limited (R. 732-4, 968-9). Moreover, the Company did not seek court relief or clarification of the Board's reinstatement order or advice as to further proceedings until after the Board's letter of March 22, 1960 (A. 969; 399 F. 2d 363). On November 7, 1957, when the Company asked to be informed of "any instance of a failure to fully comply with the order" (A. 966; 399 F. 2d 362) over two years after the strike ended, the Company, "experienced in labor disputes and represented by outstanding counsel" (A. 963-4; 399 F. 2d 360) had failed to reinstate at least seventy employees while retaining approximately fifty-three replacements on the payroll (R. 196-7).

In the opinion presently on review, the court of appeals, on authority of *W.C. Nabors* v. *NLRB*, 323 F. 2d 686 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964), rejected the Company's defense of laches. In reciting this Company's history of unfair labor practices, the court also noted that the Company "began digging its costly pit by refusing to bargain with the duly certified union" (A. 960; 399 F. 2d 359). The Company was aware of the difficulties that would result from "its forthright but risky course of declining to bargain at all . . ." (A. 963; 399 F. 2d 360; citing 245 F. 2d 598). The Company, said the court, could not have "misunderstood" the 1957 decree enforcing the Board's reinstatement order (A. 964; 399 F. 2d 360).

The court concluded, however, despite an earlier finding that this employer was no "babe in the woods, now about to be victimized for ignorance or inadvertent inepti-

tude in the field of employer-employee relations" (A. 958, 399 F. 2d 358), that the Company, receiving no reply for two and one half years to its 1957 letter, "was lulled into the belief that the Board was satisfied and that no further action was to be expected" (A. 970; 399 F. 2d 363). Accordingly, for the stated objectives of vindicating the purposes of the Act, effectuating the intent of Congress and preserving the Company's due process rights, the court unequivocally and forever terminated all accrued backpay as of July 1, 1959 after "the three years" (sic) between the end of the strike and the decree of enforcement,* plus two additional years (A. 972; 399 F. 2d 365).

ARGUMENT

POINT I

The Tolling of Backpay Contravenes Well-Established Law.

The lower court decision presently under review cites no authority that explicitly sustains its essential holding. In fact, the court implictly disregards its prior decision in *W.C. Nabors* v. *NLRB, supra,* a case involving a similar delay by the Board in which the court held that the Company could not avail itself of the defense of laches, could not invoke a state statute of limitations and could not introduce evidence of irreparable injury caused by undue administrative delay. *A fortiori,* this case, where the employer at a hearing held before *Nabors* came down was given every opportunity by the Trial Examiner to show irreparable injury but failed to do so.

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* The strike ended on April 5, 1955. The decree granting enforcement was issued on August 31, 1957 (A. 964-6; 399 F. 2d 360, 362).

The decision in this case attempts to avoid *Nabors* by relying upon the court's statutory power to modify Board orders (A. 970-1; 399 F. 2d 363-4), citing *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); National Labor Relations Act, as amended §§10(e), (f), 29 U.S.C. §§160(e), (f) (1958 ed.); but since the court could not quarrel with the Board's findings of fact nor the agency's reliance upon existing law, the court modified on grounds that can only suggest the equitable defense of laches explicitly rejected in *Nabors*.

Moreover, the court of appeals incorrectly interprets *Brown* and *Deering Milliken Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961) to permit circuit courts to strike a "balance between the interest of the Board, of the Union, and of the employer" (A. 971; 399 F. 2d 364). It is significant, for our purposes, that the court's formulation omits any reference to the aggrieved employees, but it is apparent from a close reading of the decisions of this Court and of the Fourth Circuit that both tribunals simply affirmed the obligation of the federal courts to scrutinize judgments made by the *Board* "as to the proper balance to be struck between conflicting interests". *NLRB* v. *Brown, supra* at 291; cf. *Deering Milliken, Inc.* v. *Johnston, supra* at 856.

In another circuit court decision, cited as authority for the decision below (A. 971; 399 F. 2d 364), *NLRB* v. *Ozark Hardwood Company*, 282 F. 2d 1 (8th Cir. 1960) the case was remanded, without prejudice, to the Board to determine whether certain backpay awards should be rejected because some employees might have retired during the backpay period (at 7-8). In other words, the court in *Ozark Hardwood Company*, in conformity with established law, simply refused to enforce a Board order that apparently was unsupported by substantial evidence and legal principles governing backpay determinations. The court below in this case exercised the same authority, though without enunciating reasons, in disqualifying an additional ten claimants (A. 972; 399 F. 2d 365).

While this Court in *Brown* emphasized that the balance struck by the Board was not immune from judicial examination and reversal in "proper cases" (380 U.S. 298), such situations (at 298, note 5) included *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) where a Board finding that an employer's refusal to allow distribution of union literature on a company owned parking lot violated § 8(a)(1) of the Act, was set aside "as resting on an *erroneous legal foundation*" (emphasis supplied) (380 U.S. 298, note 5). This Court in *Brown* also said (*ibid.*) that since *NLRB* v. *Truck Drivers' Local Union No. 449* (Buffalo Linen Supply Co.), 353 U.S. 87 (1963) "numerous Board orders have been set aside as outside of the *Board's statutory authority*" (emphasis supplied).

There is nothing in the lower court decision in this case to indicate that the Board exceeded its statutory authority, or that the Board order conflicts with prior law or is unsupported by substantial evidence on the record considered as a whole or constitutes an unreasonable exercise of the Board's administrative discretion. Instead, the court, enunciating new principles of substantive law as well as judicial review not contemplated by § 10(e) of the National Labor Relations Act or § 10(e) of the Administrative Procedure Act chose to punish the Board for its administrative delays by denying backpay to innocent employees.

POINT II

The Tolling of Backpay Constitutes an Unwarranted Interference with the Board's Expertise.

It is a matter of historical record that the Board, a regulatory agency, exists to bring special expertise to the volatile area of labor-management relations. In a 1941 decision, this Court said "the relation of remedy to policy is peculiarly a matter for administrative competence.

Courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy". *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 192 (1941).

In this case, the lower court wrongly substituted its own judgment for that of the Board in deciding what remedy in this case would best effectuate the purposes of the Act. In so doing, however, it is ironic that the court arrogated to itself an extra-statutory authority more exalted than the kind usually associated with the Board on reversals. "Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 498 (1960).

The court sought to protect what it described as the "Due Process" and statutory rights of one respondent employer while disregarding the Board's principal mandate to effectuate public policy and not private rights. In *Phelps Dodge Corporation, supra*, this Court sustained an order calling for the reinstatement with interim backpay of discriminatees who had obtained "substantially equivalent employment" elsewhere (313 U.S. 192). To do otherwise, this Court held, would restrict the Board to the correction of private injuries (*ibid.*).

Moreover, the backpay remedy is "designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice". *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). While the court's attempt to protect this Company's due process rights against lawful Board activity flies in the face of all precedent, this Court in one case declined to shorten the period of backpay compensation despite the Board's two-year delay in issuing a decision and order; this Court refused to "penalize the employees" for the delay. *NLRB*

v. *Electric Vacuum Cleaner Co., Inc.*, 315 U.S. 685, 698 (1942).

In this case, the concern of the court of appeals is misplaced. Board delays will generally discourage employees in the exercise of their organizational rights but in most cases, as in this one, the lapse of time between the enforcement of a Board order and issuance of a backpay specification will have no serious impact, financial or otherwise, on the delinquent employer. For example, interest (at a modest rate of 6%) did not begin to accrue on the money owing by this Company until June 2, 1964 (A. 962; 399 F. 2d 360), the date of the Trial Examiner's decision, nine years after the strike ended. At the same time, the drastic court modification conceivably will persuade other employers that the National Labor Relations Act may be defied with near impunity.

Perhaps most important, in substituting its own judgment for that of the Board, the court, of necessity, had to make a factual determination, unsupported by the evidence, that the Board's delay was "inordinate". Aside from the fact that the record is barren of any evidence that earlier issuance of the specification would have altered the posture of this case, the record does contain uncontroverted testimony that the Board's New Orleans region "had an extremely heavy case load" (A. 969; 399 F. 2d 363). But the court gratuitously decided that the regional office could have deployed one or more of its six attorneys to work on this case (*ibid.*). In a similar case the Second Circuit, more realistically, attributed delay in issuing a specification to the "inherently time-consuming nature of the backpay remedy, complicated by a serious and protracted shortage of Board personnel capable of preparing the specification". *NLRB* v. *Mastro Plastics Corporation*, 354 F. 2d 170, 180-1 (2nd Cir. 1965), cert. denied 384 U.S. 972 (1966).

In short, the court of appeals substituted its own judgment for the expertise of the Board, acknowledged by this Court in many decisions, to effectuate the policies of the National Labor Relations Act; in so doing, however, and against the weight of the evidence, the court decided how the Board should best conduct its internal affairs.

POINT III

The Tolling of Backpay Does Violence to the Equities in This Case.

We have shown above that the lower court, contrary to precedent, in effect granted the Company's defense of laches and, in excess of its authority, not only undertook to balance itself the competing interests among the parties but also substituted its judgment, based on speculation only, for that of the Board in conducting the daily operations of the New Orleans regional office.

But assuming *arguendo* that we are wrong on these points, it is nevertheless clear that the court of appeals has chosen to make new law at the expense of innocent employees and for the benefit of an employer who consciously embarked on a course of conduct designed to frustrate the purposes of the Act, as the lower court itself has documented (229 F. 2d 816; 245 F. 2d 594).

More important, however, the court of appeals expressed concern for the "Due Process", *i.e.* substantive, property rights of the Company (A. 972; 399 F. 2d 365); contra, *Snell, et al.* v. *Wyman, Commissioner, et al.*, 281 F. Supp. 853 (S.D.N.Y. 1968) aff'd per curiam — U.S. —, 89 Sup. Ct. 553 (1969); *Thorpe* v. *Housing Authority of Durham*, — U.S. —, 89 S. Ct. 518 (1969), cf. *Lochner* v. *New York*, 198 U.S. 45 (1905). The court *suggested*, without evidentiary support, that the Company was handicapped at the hearing in attempting to prove facts in mitigation of damages. The court *speculated* that the Company's problems were compounded by the delay (A. 971).

But the court also overlooked its earlier finding that both the Company and its counsel, to use a euphemistic expression, were highly sophisticated in labor matters (A. 963-4; 399 F. 2d 360). Charged with knowledge of the reinstatement obligation in unfair labor practice situations enunciated by the Supreme Court fourteen years earlier in *Phelps Dodge Corp., supra* (at note 7), the legal representatives of this employer could not reasonably have supposed that the Board would drop the claims of strikers denied reinstatement. Indeed, a complaint had issued and a hearing held on the refusal to bargain charge before the strike ended (115 N.L.R.B. 388).

Moreover, the resolution of most of the problems referred to by the court, *e.g.* "proving there was a job available . . . whether a discharge after reinstatement was made in good faith . . ." (A. 971; 399 F. 2d 364) was solely within the power of the Company. The Company failed to adduce proof at the hearing not because of the delay factor but because this company had chosen to brazenly disregard its reinstatement obligation.

Even in the limited area of search for employment, where the Company to some extent had to refute the oral testimony of claimants, the Company's experienced counsel, in examining uneducated witnesses, sometimes unfairly adduced contradictions in testimony. It is true that many claimants could not remember dates and places of searches for employment but it is naive to suppose that a witness's recollection of factories visited during specific calendar quarters would be clearer two years rather than three or four years after the events. Certainly, any respondent in a backpay proceeding will have difficulty on this score but this is included among the foreseeable consequences of his wrongdoing.

Moreover, the court of appeals erred in its gratuitous assertion that "Actually, about all the Company could do . . . was to cross-examine . . ." (A. 971; 399 F. 2d 364).

On the contrary, the Company was furnished statements made by claimants to Board personnel as well as records of interim earnings and unemployment insurance payments. The Company, with some success, introduced spurious "business records" into evidence that, if fully accepted by the examiner, would have destroyed most of the backpay claims (A. 205-7). The Company was able to use applications for employment to attack claimants' credibility as to periods of pregnancy, etc.

Finally, the absence of documentary evidence of interim employment creates at least a serious inference that these low-income claimants, faced with deep suffering as an alternative, did not work solely because employment was unavailable and not in reliance upon the remote possibility of an NLRB backpay remedy some years later.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the Board's backpay order reinstated.

Dated: New York, New York
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Respectfully submitted,

JACOB SHEINKMAN
15 Union Square West
New York, New York 10003

RALPH N. JACKSON
1411 Decatur Street
New Orleans, Louisiana 70116
Attorneys for Respondent

JAMES J. GRAHAM
46 Washington Mews
New York, New York 10003
of Counsel